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Michael W. Sweeney

WORKING TOWARDS A BETTER UNDERSTANDING OF ATTENTION DEFICIT HYPERACTIVITY DISORDER AS A LEGAL DISABILITY IN EMPLOYMENT LAW

Michael W. Sweeney[*]

INTRODUCTION

Over the past decade, millions of Americans have been diagnosed with attention deficit hyperactivity disorder (ADHD).[1] This condition can be characterized by a number of symptoms: inability to focus, being easily distracted, irritability, short attention span, disorganization, difficulty following directions, and distortions of time-sense.[2] ADHD is now a commonly diagnosed disorder recognized

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*J.D., The Catholic University of America, Columbus School of Law (2004); B.A., University of Notre Dame (1995); associate at the law firm of Partridge Snow & Hahn LPP, Providence, Rhode Island. The author expresses his sincere gratitude to the attorneys and legal staff at the Office of House Employment Counsel, United States House of Representatives, for their professional guidance and continuing support. Special recognition is given to Professor Roger Hartley, whose expertise and review were essential to the development of this piece.

1. See David W. Lannetti, *Extending Coverage of the Americans with Disabilities Act (ADA) to Individuals with Attention Deficit-Hyperactivity Disorder: A Demonstration of Inadequate Legislative Guidance*, 15 LAB. LAW. 231, 234 (1999). Over the past decade, it is estimated that fifteen million American adults are affected by ADHD. *Id.* While the official name of the condition is ADHD, many professionals still refer to it by its previous name, attention deficit disorder (ADD). *See Attention Deficit Disorder, at* http://www.addadhd.org/ADHD_attention-deficit.html (last visited Nov. 7, 2004). "The disorder's name has changed as a result of scientific advances and the findings of careful field trials." *Id.* Researchers believe that ADHD "is not one specific disorder with different variations." *Id.* For the purposes of this article, no distinction is made between the former name of this medical condition, attention deficit disorder and its current name, attention deficit hyperactivity disorder.

2. *See* THOM HARTMANN, ATTENTION DEFICIT DISORDER: A DIFFERENT PERCEPTION 5-7 (Publisher's Group West 1997).

increasingly by both social scientists and the medical community.[3] As a result, ADHD advocates have worked hard to bring the condition into the "spotlight" of American public policy, reflecting an increased interest in the range of social effects posed by its symptoms.[4] To date, most of the attention regarding ADHD policy has centered on the classroom environment and helping children overcome learning challenges associated with the condition.[5] However, recent consideration has been given to the impact of ADHD in the workplace and its possible link with work performance difficulties.[6]

ADHD advocates have paid close attention to these recent studies, causing widespread speculation regarding potential disability rights in the employment context.[7] Specifically, many ADHD sufferers who

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3. *Attention Deficit/Hyperactivity Disorder – Are We Overmedicating Our Children?: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. 101 (2003) [hereinafter *ADHD Hearings*] (statement of E. Clarke Ross, Chief Executive Officer, CHADD (Children and Adults with Attention Deficit/Hyperactivity Disorder)) ("In 1998, the American Medical Association published an exhaustive review of the scientific literature concerning AD/HD, concluding that the disorder is real and that while there may be a problem with over diagnosis, there is a greater problem with underdiagnosis.").

4. *See* KATHLEEN G. NADEAU, ADD IN THE WORKPLACE: CHOICES, CHANGES, AND CHALLENGES 5 (1997).

5. *Id.* at 1; *see also* Lannetti, *supra* note 1, at 233 ("Teachers and parents have always been aware that some children are particularly fidgety or overactive.").

6. *See generally* NADEAU, *supra* note 4.

7. *Id.* at 208-14. Dr. Nadeau, an advocate for ADHD individuals, assumes a broad range of rights for ADHD employees in the workplace and explains how they are "legally protected in the workplace as person[s] with disabilit[ies]." However, this article cautions against such assumptions, as many courts are hesitant to recognize ADHD's legal disability status. *See, e.g.*, Ferrell v. Howard Univ., No. CIV.A.98-1009, 1999 WL 1581759, at *2 (D.D.C. Dec. 2, 1999) ("Courts are divided on the issue of whether ADD is a disability under the ADA."). Much of the hesitation can be attributed to disputes over whether ADHD is an abnormal medical condition or not. As one researcher notes, "The more I've come to understand AD[H]D – both through my research into scientific literature and through my own work with clients – the more I see it as an alternate and perfectly natural way of brain wiring." LYNN WEISS, ADD ON THE JOB: MAKING YOUR ADD WORK FOR YOU 5 (1996). Should a "natural way of brain wiring" really constitute a protected disability? Another expert suggests that special treatment for ADHD employees is not effective: "It is not a solution to apply a disempowering label to [ADHD] people. It's not even a solution to throw some drugs at them, or toss them into 'special' classrooms or give them workplace 'accommodations.'" *See* THOM HARTMANN, HEALING ADD: SIMPLE EXERCISES THAT WILL CHANGE YOUR DAILY LIFE 31 (1998). However, Dr. Nadeau views

have been disciplined or terminated by an employer for poor work performance feel that they have been treated unjustly because of the uncontrollable effects of their condition.[8] Moreover, they feel little is being done by their employer to understand or accommodate this ailment.[9] Consequently, an increasing number of lawsuits have been filed under the Americans with Disabilities Act (ADA)[10] by ADHD employees claiming wrongful discrimination or termination.[11] Many employees feel justified filing such causes of action, but no widespread consensus exists regarding treatment of this condition as a legal disability for purposes of the statute.[12] While the ADA considers

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ADHD as an abnormal medical condition that requires special attention. She responds to skeptics of the disorder by stating "AD[H]D is a genuine neurobiological disorder, one that, if untreated, can cause enormous difficulty and suffering in the lives of those who have it." NADEAU, *supra* note 4, at 9.

8. For specific cases discussing employees' perceived unjust treatment, see *infra* note 11. *See also* NADEAU, *supra* note 4, at 210-11. Dr. Nadeau recommends that ADHD employees retain a lawyer once their employers fail to meet their needs through reasonable accommodation.

9. *See* cases cited *infra* note 11.

10. 42 U.S.C. §§ 12101-12213 (2002).

11. *See, e.g.*, Calef v. Gillette Co., 322 F.3d 75, 77 (10th Cir. 2003) (ADHD employee alleged his employer violated the ADA by terminating his employment, failing to reasonably accommodate him, and harassing him); Robertson v. The Neuromedical Ctr., 161 F.3d 292, 294 (5th Cir. 1998) (employee claimed employer discriminated against him for failing to reasonably accommodate his ADHD); Bice v. Lennox Indus., Inc., No. Civ.A.02-342, 2003 WL 21018638, at *2 (E.D. La. May 5, 2003) (salesperson diagnosed with ADHD alleged employment discrimination); Felten v. Eyemart Express, Inc., 241 F. Supp. 2d 935, 936 (E.D. Wisc. 2003) ("Eyemart failed to accommodate [employee's] adult attention deficit disorder (ADD) and improperly fired him from his position as general manager of one of Eyemart's stores because of his ADD."); Todd v. McCahan, 158 F. Supp. 2d 1369, 1373 (N.D. Ga. 2000) ("Plaintiff contends that Defendants subjected him to discrimination, harassment and retaliation due to his alleged disability, Attention Deficit Hyperactivity Disorder ('ADHD').").

12. *See* Ferrell v. Howard Univ., No. CIV.A.98-1009, 1999 WL 1581759, at *2 (D.D.C. Dec. 2, 1999) ("Courts are divided on the issue of whether ADD is a disability under the ADA."). Some of the confusion regarding the legal treatment of ADHD stems from conflicting reports regarding the true nature of this condition. *See ADHD Hearings*, *supra* note 3, at 117 (statement of Dr. David Fassler, American Psychiatric Association). This may cause judges to be cautious in awarding disability status to ADHD. As Dr. David Fassler of the American Psychiatric Association testified before Congress, "periodic waves of media attention questioning the disorder's prevalence and treatment are confusing to the public and understandably perplexing to legislators." *Id.*

whether a legal disability exists on a case-by-case basis,[13] a mere diagnosis of a medical condition is not sufficient to establish an individual's disability status.[14] Recognition of ADHD as a disability raises particular concerns for employers as its effects are often difficult to distinguish from routine human behaviors otherwise subject to discipline.[15]

This Note will evaluate whether ADHD is likely to be treated as an ADA-covered disability by analyzing this condition under the ADA's statutory scheme. Additionally, the Note will examine a number of ADHD cases decided in recent years under the ADA. In the end, this Note will determine whether or not ADHD employees should expect their condition to be treated as a disability under the ADA.

The determination of the condition's "disability" status is significant because it is the first analytical step for any ADA cause of action. If ADHD is not found to constitute a disability under the ADA, no wrongful action will be available. This area is in dire need of clarity given the emergence of ADHD as a recognized medical condition,[16]

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13. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) (holding that an individual's disability status must be made on a case-by-case basis).

14. *Id.* (quoting 29 C.F.R. App. § 1630.2(j), 56 Fed. Reg. 35,726, 35,741 (1991)) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."). *See also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 185 (2002) ("It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment.").

15. Employers frequently encounter situations in which an employee's behavior or personality traits lead to workplace difficulties. ADHD employees may be particularly susceptible to these instances. *See* WEISS, *supra* note 7, at 10-36. If ADHD is a recognized disability, it may be difficult for employers to distinguish its symptoms from those of natural human behavior which are otherwise subject to discipline. Furthermore, ADHD researchers acknowledge that employers do not have time to dissect and analyze "every misunderstanding or hurtful situation" that is faced by an ADHD employee. *See id.* at 14. Still, employers reserve the right to discipline or discharge their employees in accordance with company handbooks and policies. *See, e.g.*, Lileikis v. SBC Ameritech, Inc., 84 Fed. Appx. 645, 650 (7th Cir. 2003) ("[Depressed employee] was fired because of her poor attendance record and because she eventually stopped showing up for work, not because she was disabled.").

16. *See ADHD Hearings*, *supra* note 3, at 70 (statement of Dr. Richard K. Nakamura, Acting Director, National Institute of Mental Health, National Institute of Health, U.S. Department of Health and Human Services) ("All of the major medical associations and governmental agencies recognize ADHD as a

the rising number of employment complaints,[17] and the lack of consensus among courts.[18] Moreover, the issue will gain importance as employers receive an increased number of ADHD-diagnosed employees, and courts begin to hear more ADHD discrimination cases.

I. UNDERSTANDING ATTENTION DEFICIT HYPERACTIVITY DISORDER (ADHD)

Before conducting the legal analysis of any potential disability, it is necessary to understand the nature of an individual's medical condition. This is especially important under the ADA because coverage for individuals extends beyond those with so called "traditional handicaps."[19] The nature and limitations of a condition are crucial determinants of whether that condition achieves disability status under the ADA.

ADHD has been described by one psychologist as a complex condition that requires diagnosis by an experienced professional.[20] In this regard, ADHD does not seem dissimilar from any other medical disease or condition. However, no theory on the cause of ADHD has been proven, and it remains an open topic for discussion.[21] Several propositions have emerged over the years.[22] The earliest theories characterized ADHD as a "diseased state" associated with brain damage or dysfunction.[23] This early characterization caused ADHD to be grouped with other mental illnesses and psychiatric disorders that

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genuine disorder because the scientific evidence indicating it is so overwhelming . . . .") (quoting R.A. Barkley, *International Consensus Statement on ADHD, January 2002*, 5 CLINICAL CHILD FAM. PSYCH. REV. 89, 89-111 (2002)).

17. *See supra* note 11.

18. *See supra* note 12.

19. *See* S. REP. NO. 101-116, at 22 (1989) (S. Comm. on Labor and Human Res.). This underlying philosophy of the statute is important as it is designed to provide coverage to new conditions and disabilities. Moreover, it does not force the courts to restrict their decisions in favor of a narrow group of people, particularly where it would appear that justice demands review of an individual's condition. This notion of a "case-by-case basis" has empowered the court to consider all conditions in light of varying circumstances while fulfilling a major goal of the legislation--broadening of statutory protection to more individuals.

20. *See* WEISS, *supra* note 7, at 8.

21. *See* HARTMANN, *supra* note 7, at 46-49.

22. *Id.* at 47.

23. *See* HARTMANN, *supra* note 2, at 21.

were commonly connected with early trauma or childhood abuse.[24] Even in the latter part of the twentieth century, when ADHD received official recognition as a specific disorder, children diagnosed with the condition were thought of as "bad people" and grouped with troublemakers.[25]

Recent research shows a high incidence of ADHD among parents of children who have been diagnosed with the same condition.[26] This causes some researchers to speculate that ADHD is a learned behavior, following a pattern similar to child or spousal abuse.[27] Other researchers suggest that ADHD is the result of poor dietary habits, which can also account for generational patterns of the condition.[28] Some of the most popular scientific explanations for the condition come from studies that implicate neurotransmitter deficits, genetics, and perinatal complications.[29]

The distinct symptoms of ADHD are revealed through its name: attention deficit and hyperactivity-impulsivity.[30] Although the symptoms often occur simultaneously, both do not have to be present for a diagnosis.[31] The symptoms may manifest themselves in a variety of ways. For example, symptoms of hyperactivity include excessive restlessness and the recurring desire to walk and run around.[32] Moreover, some ADHD persons can be fidgety, interruptive, incapable of awaiting their turn, and act on impulse regardless of the consequences.[33] Although many of these symptoms may be considered

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24. *Id.*

25. *Id.* at 21-22.

26. *Id.* Between ten and thirty-five percent of children with ADHD have a first- degree relative with past or present ADHD. Additionally, approximately half of all parents who have the condition have a child with ADHD. *See ADHD Hearings*, *supra* note 3, at 69 (statement of Dr. Richard K. Nakamura, Acting Director, National Institute of Mental Health, Nationall Institute of Health, U.S. Department of Health and Human Services).

27. *See* HARTMANN, *supra* note 2, at 22.

28. *Id.*

29. *See ADHD Hearings*, *supra* note 3, at 69 (statement of Dr. Richard K. Nakamura, Acting Director, National Institute of Mental Health, National Institute of Health, U.S. Department of Health and Human Services).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id. See also ADHD Hearings*, *supra* note 3, at 122-23 (statement of Dr. David Fassler, American Psychiatric Association) (citing diagnostic criteria for ADHD).

normal, particularly for children, they occur more frequently for those diagnosed with ADHD and interfere with the person's normal functioning capability.[34] Overall, hyperactivity symptoms tend to diminish with age and are often associated with the development of other disorders such as depression and anxiety, although the exact cause of this relationship is unknown.[35]

Inattention symptoms, on the other hand, are likely to endure into adulthood.[36] Like hyperactivity, people exhibit inattention symptoms in many different ways. Typically, ADHD individuals have problems following through on instructions, paying close attention, being patient, recording important details, organizing themselves, engaging in tasks that require sustained mental effort, and appearing to be easily distracted or forgetful.[37] Though much debate exists over the number and types of symptoms one must exhibit to be classified as ADHD, the presence of chronic and pervasive behavioral patterns is "critical to the diagnosis."[38]

Perhaps what makes ADHD such an interesting case study are the unknowns of the condition and the common features it shares with normal human behavior. As one ADHD expert noted, "If AD[H]D is a genetic disease or an abnormality, it's a popular one, possibly afflicting as many as 25 million individuals in the United States."[39] With such a wide distribution among the population, is it reasonable to conclude that ADHD qualifies as a legal disability?[40] Indeed, the symptoms of ADHD are not uncommon. "Everybody suffers from some of these symptoms some of the time."[41] However, it is the frequency with which these symptoms occur and the interference with

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34. *See ADHD Hearings*, *supra* note 3, at 69 (statement of Dr. Richard K. Nakamura, Acting Director, National Institute of Mental Health, National Institute of Health, U.S. Department of Health and Human Services).

35. *Id.*

36. *Id.*

37. *See id.* at 122-23 (statement of Dr. David Fassler, American Psychiatric Association) (citing diagnostic criteria for ADHD).

38. *Id.*

39. *See* HARTMANN, *supra* note 2, at 22.

40. Some medical professionals have already made this radical jump and assume that disability laws cover ADHD. *See, e.g.*, NADEAU, *supra* note 4, at 8 ("And we now have laws, covering both children and adults, that require schools and employers, among others, to respond to the needs of those with AD[H]D.").

41. BPhoenix, *Symptoms of ADHD*, *at* http://www.angelfire.com/home/bph oenix1/adhdsymp.html (last visited Nov. 7, 2004).

the ability to function normally in a work environment that sets ADHD sufferers apart.[42]

No matter how one views the condition, recognition of ADHD as a medical disorder has increased, and the demand for adult services has grown enormously in response to recent awareness "that AD[H]D affects people of all ages."[43] As ADHD advocates attempt to advance their cause, they are encouraging adult workers to consider their legal options under the ADA and proposing guaranteed legal protections for ADHD employees in the workplace.[44] Consequently, federal courts have seen an increased number of cases filed in which ADHD adults have attempted to assert disability rights under the ADA.[45]

The issue is unsettled on whether courts are likely to recognize ADHD as a legal disability. Although ADHD traits can make the workplace a difficult and trying environment,[46] employers still have the right to discipline their employees based on patterns of misbehavior or poor productivity.[47] While many diagnosed with ADHD claim that their condition causes poor work performance, it is often difficult if not impossible for employers to distinguish behaviors that should be attributed to ADHD from those that should not.[48] Furthermore, disagreement over whether ADHD constitutes a medical disorder or normal human behavior has left its legal status unresolved.[49] How should the law treat this unique condition? The first and most important step is to determine whether an individual has a disability

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42. *See id.*

43. *See* NADEAU, *supra* note 4, at 5.

44. *Id.* at 208-14.

45. *See supra* note 11.

46. *See generally* NADEAU, *supra* note 4; WEISS, *supra* note 7.

47. *See, e.g.*, Lileikis v. SBC Ameritech, Inc., 84 Fed. Appx. 645, 650 (7th Cir. 2003) ("[T]ermination [was] clearly justified by [employee's] awful attendance record.").

48. *See* Lois Bartels, *Coping with ADHD at Work*, *at* http://www.madison.com/captimes/features/expert/48427.php (last visited Apr. 1, 2004) ("[M]any employers feel that disorders that don't make one look physically different are just excuses for poor work performance. It is easy for employers to understand how special accommodations are necessary for someone who is blind or paralyzed. It is harder for the same people to understand that employees with ADHD need support too.").

49. *See* Ferrell v. Howard Univ., No. CIV.A.98-1009, 1999 WL 1581759, at *2 (D.D.C. Dec. 2, 1999) ("Courts are divided on the issue of whether ADD is a disability under the ADA.").

under the ADA.[50] Such a finding is a matter of legal analysis, and courts have begun to apply the disability standard to ADHD complaints more frequently in recent years.[51]

II. APPLYING THE LEGAL DISABILITY STANDARD TO ADHD

Under the ADA, an individual must first establish that he or she has a legal disability.[52] For most causes of action this requires the individual to demonstrate "[a] physical or *mental impairment* that *substantially limits* one or more *major life activities* . . . ."[53] It is important to remember that the definition of disability is a legal one.[54] As such, a mere diagnosis of ADHD is not determinative of an individual's disability status[55] as some advocates might suggest.[56] Instead, the Supreme Court has noted that coverage under the ADA depends upon an "individualized inquiry that is particular to the facts of each case."[57] This requires a careful examination of the criteria "to

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50. *See* discussion *infra* Part II.

51. *See* discussion *infra* Part III.

52. 42 U.S.C. § 12102(2) (2002).

53. *Id.* (emphasis added). This covers ADHD employees who complain of discrimination on the basis of a present disability. However, legal disability status under the ADA is also available for employees who demonstrate "a record of such an impairment" or that he or she is "regarded by the employer as having such an impairment." *Id.* Because most ADHD complaints involve a present disability, this Note will focus on the findings of those particular cases.

54. *See* Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 155 n.18 (1st Cir. 1998) (quoting DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS – FOURTH EDITION (DSM-IV) at xxiii (American Psychiatric Association, 1994)) [hereinafter DSM-IV] ("In determining whether an individual meets a specified legal standard . . . additional information is usually required beyond that contained in the DSM-IV diagnosis . . . .").

55. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 185 (2002) ("It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment.").

56. *See* NADEAU, *supra* note 4, at 6 ("Now that we understand much more about how to help individuals with ADD and have passed legal mandates to assist both children and adults with ADD, there is a strong incentive for those with the disorder, who have always been with us, to be *diagnosed* and to receive treatment.") (emphasis added).

57. Sutton v. United Airlines, Inc., 527 U.S. 471, 483 (1999).

be applied in light of the statutory language, the administrative regulations and cases under related federal and state law."[58]

A. Physical or Mental Impairment

The starting point for analyzing whether ADHD constitutes a legal disability is the phrase "physical or mental impairment."[59] Courts begin their analysis by looking at the Equal Employment Opportunity Commission (EEOC) regulations, which provide that a "'physical or mental impairment' . . . [is] any physiological disorder . . . or *any mental or psychological disorder.*"[60] Although ADHD is a widely studied mental condition, this analysis requires a determination of whether it qualifies as a mental disorder. EEOC regulations state that mental or psychological disorders include emotional or mental illnesses as well as specific learning disabilities.[61] While ADHD is not mentioned as a specific mental or psychological disorder within the regulations, the EEOC emphasizes that the ADA does not adopt a "laundry list" approach,[62] leaving open the possibility for ADHD to qualify as an impairment under the ADA.[63]

Most of the cases that discuss ADHD as a potential disability do not spend much time on the "impairment" portion of the analysis[64] as

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58. *See* JONATHAN R. MOOK, 1 AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER RESPONSIBILITIES 3-1 (MB 2002).

59. *Id.* at 3-12.

60. 29 C.F.R. § 1630.2(h) (2002) (emphasis in original).

61. *Id.*

62. *See* 28 C.F.R. § 36.104(1)(ii) (2002); *see also* Burch v. Coca-Cola Co., 119 F.3d 305, 315 (5th Cir. 1997) ("As the EEOC's interpretive guidance makes plain, the ADA does not attempt to set forth a laundry list of impairments . . . ."); Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) ("The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a 'laundry list' of impairments . . . .").

63. The impairment portion of the analysis is an important step that should be addressed more adequately by the courts. As one author notes: "[T]he statutory language of the ADA is not clear regarding the 'mental impairments' intended by Congress to be protected under the Act." Lanetti, *supra* note 1, at 249. At best, the judicial approaches to determining mental impairments have been inconsistent. *See id.*

64. *See, e.g.,* Calef v. Gillette Co., 322 F.3d 75, 83 (10th Cir. 2003) (moving directly to the substantial limitation portion of disability analysis); Bercovitch v. Baldwin Sch. Inc., 133 F.3d 141, 155 (1st Cir. 1998) (stating only that plaintiff *may* have an impairment); Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 506 (7th

ADHD is a medically diagnosed condition frequently associated with mental or emotional health.[65] Because "mental or psychological disorders" can include any number of conditions, courts have broadly interpreted the term "mental impairment," offering deference to medical opinion.[66] Therefore, ADHD will likely qualify as a mental impairment most of the time.[67] Considering these holdings, ADHD seems to meet the prescribed standard for "impairment" because the EEOC's list of mental disorders is not exhaustive.[68]

However, it is also possible to argue that an individual's ADHD does *not* qualify as a legal impairment under the ADA. While many analysts might be willing to cede this potential argument because of the medical community's recognition, it is certainly within an employer's analytical arsenal.[69] This is possible because EEOC regulations do not list ADHD specifically as an impairment. Rather,

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Cir. 1998) (stating without discussion that there is "no dispute that AD[H]D qualifies as an impairment for purposes of the statute"); Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998) (no discussion of impairment standard).

65. The American Psychiatric Association has classified ADHD as a "mental disorder" in *DSM-IV*. DSM-IV, *supra* note 54.

66. *See* Krocka v. City of Chicago, 203 F.3d 507, 512 (7th Cir. 2000) ("Medically diagnosed mental conditions are impairments under the ADA."); Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054, 1059 (7th Cir. 1998) (stating "[m]edically diagnosed mental conditions" are impairments under the ADA).

67. *See supra* notes 64-66. This conclusion seems logical given courts' general willingness to defer to the medical community on what constitutes an impairment and the little amount of time that is traditionally spent on the impairment portion of the analysis. In effect, courts often assume without deciding that medically diagnosed conditions constitute impairments. Case law demonstrates that ADHD, as a medically diagnosed condition, has been afforded this benefit of the doubt. *See, e.g., Davidson*, 133 F.3d at 506 ("There is no dispute that ADD qualifies as an impairment for purposes of the statute."); *Bercovitch*, 133 F.3d at 155 (finding that a plaintiff diagnosed with ADHD may have a mental impairment within the meaning of the statute); Kohn v. Am. Tel. & Tel. Corp., 58 F. Supp. 2d 393, 413 (D.N.J. 1999) ("Most courts which have addressed this issue have concluded that ADD and ADHD qualify as mental impairments under the ADA.").

68. *See Bercovitch*, 133 F.3d at 155 n.18 ("Although the relevant regulations do not specifically list ADHD as an included physical or mental impairment, the list is not exhaustive and includes 'any mental or psychological disorder such as mental retardation . . . emotional or mental illness, and specific learning disabilities . . . .'") (citing 28 C.F.R. § 36.104 (2002)).

69. *See Kohn*, 58 F. Supp. 2d at 413 ("This Circuit has not squarely addressed whether ADD or the related condition, Attention Deficit-Hyperactivity Disorder ("ADHD"), qualifies as an impairment within the meaning of Section 12101(2).").

the regulations discuss how a mental impairment includes "[a]ny mental or psychological disorder such as mental retardation . . . emotional or mental illness."[70] It is true that ADHD is listed as a "mental disorder" in the American Psychiatric Association's *Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV)*,[71] a general reference utilized by courts for disability issues.[72] However, the *DSM-IV* cautions that a medical diagnosis should not be equated with a qualifying legal impairment:

> [There is an] imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis [,] in most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder,' 'mental disability,' 'mental disease, ' or 'mental defect.' In determining whether an individual meets a specified legal standard . . . additional information is usually required beyond that contained in the DSM-IV diagnosis . . . . It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.[73]

As *DSM-IV* openly recognizes, arguing against a medical diagnosis as an impairment is plausible because the term "mental impairment" is a legal definition, not a medical one. Consequently, the history of disability law suggests there is a difference between a medical condition affecting a bodily system that represents some form of "diminution in value, quality, excellence or strength,"[74] and a medical condition affecting a bodily system that falls within the normal range

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70. *See* 29 C.F.R. § 1630.2(h)(2) (2002).

71. *See* DSM-IV, *supra* note 54, at xxiii.

72. *See* Boldini v. Postmaster Gen., 928 F. Supp. 125, 130 (D.N.H. 1995) ("A court may give weight to a diagnosis of mental disorders of the American Psychiatric Association."); *see also* EEOC ENFORCEMENT GUIDANCE ON THE ADA AND PSYCHIATRIC DISABILITIES 3 (1997) [hereinafter EEOC GUIDANCE], *available at* http:www.eeoc.gov/policy/docs/psych.html (last visited Nov. 7, 2004) (discussing how "DSM-IV has been recognized as an important reference by courts").

73. DSM-IV, *supra* note 54, at xxiii.

74. MOOK, *supra* note 58, at 3-16. These conditions would seem to fall within the fundamental spirit of the ADA in providing coverage to "individuals with limitations that are generally targeted for discrimination and exclusion" and who are "the most needy and deserving." *See* Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AMER. U. L. REV. 1213, 1221 (2003).

of human behaviors.[75] This notion is supported by case law examining the "mental impairment" standard.[76] For example, in *Forrisi v. Bowen*[77] the court noted: "The very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment."[78] More recently, a federal court in the District of Maryland elaborated on the need to distinguish between conditions of normal human behavior and mental impairments by stating "'personality traits that are commonplace or characteristics within the normal range' that are not symptoms of a mental or psychological disorder are not impairments afforded protection under the ADA."[79]

In the case of an individual diagnosed with ADHD, it is possible for a court to find that an employee's condition is not a mental impairment if it can be shown that his condition had little or no impact on his bodily activities and falls within a normal range of human

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75. *See* MOOK, *supra* note 58, at 3-16. For the purposes of this analysis, see *supra* notes 41-42 (describing how ADHD symptoms are exhibited by all human beings). Including medical conditions that fall within a normal range of human behaviors would likely diminish the significance of providing coverage to individuals who need it the most. Expanding the disability definition to include such conditions frustrates the ADA's goal of "corrective justice" by focusing less attention on those with truly debilitating conditions and increasing costs associated with litigation in an overcrowded court system. *See* Hoffman, *supra* note 74, at 1221-22.

76. *See* MOOK, *supra* note 58, at 3-16. It is important to recognize that the ADA's definition of the term "disability" is inherited from its previous definition under the Rehabilitation Act of 1973. *See* Kiren D. Zucker, *The Meaning of Life: Defining "Major Life Activities" Under the Americans with Disabilities Act*, 86 MARQ. L. REV. 957 (2003) ("In defining disability under the ADA, Congress turned to the definition of what it means to be handicapped under the Rehabilitation Act of 1973."). Thus, any case history that is cited prior to the ADA's passage in 1990 refers to decisions made under the Rehabilitation Act.

77. 794 F.2d 931 (4th Cir. 1986).

78. MOOK, *supra* note 58, at 3-16 (citing *Forrisi*, 794 F.2d at 934; E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097-98 (D. Haw. 1980)) (impairment defined as "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity").

79. Tozzi v. Advanced Med. Mgmt., No. S00-2363, 2001 WL 1081175, at *5 (D. Md. May 24, 2001).

behavior(s).[80] For example, an ADHD employee may claim that his condition caused loss of focus, distraction, irritability, increased stress levels, anxiety, depression, and sleep deprivation, all of which constitute symptoms of ADHD.[81] However, what makes ADHD uniquely susceptible to an impairment challenge is that most people in the general population experience "some of these symptoms some of the time."[82] To counter the employee's claim of impairment based upon a medical diagnosis, an employer could inquire about the acuteness of the symptoms and whether they are mild, moderate, or severe. Furthermore, it may be possible to utilize expert witnesses who would characterize the individual's condition as an exhibition of "personality traits" or "behaviors" falling within the normal range of human activity.[83]

This point is not merely academic because courts have questioned whether a diagnosis by a doctor is sufficient to establish a mental impairment within the meaning of the ADA. One case that demonstrates this is *Williams v. New York State Department of Labor*.[84] Here, an employee with a stress-related mental condition filed a complaint against the State of New York for discrimination in violation of the ADA.[85] The court found that "the record presented by [the] Plaintiff of her impairment" was "unconvincing" at best,[86] despite the fact that a medical doctor had diagnosed the plaintiff with a "psychiatric disorder of depression and anxiety."[87] The court stated that the evidence of an impairment was insufficient as it "offered little or no testimony as to [the] Plaintiff's individual symptoms or

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80. While ADHD cases are relatively new to employment litigation, at least one court has left open the possibility that ADHD does not amount to an impairment. *See supra* note 69.

81. *See ADHD Hearings*, *supra* note 3, at 122-23 (statement of Dr. David Fassler, American Psychiatric Association) (citing *DSM-IV* diagnostic symptoms for ADHD).

82. *See supra* note 41.

83. *See* MOOK, *supra* note 58, at 3-20 (citing EEOC GUIDANCE, *supra* note 72, at 4) (stating that personality traits such as stress, irritability, chronic lateness, or poor judgment are not mental impairments).

84. No. 98-3816, 2000 WL 33175735, at *1 (S.D.N.Y. May 24, 2000). Although this case does not involve an individual diagnosed with ADHD, the logic of the argument could be applied to an ADHD case and highlights the importance of establishing a record with facts that demonstrate a condition outside the normal range of human behavior.

85. *Id.*

86. *Id.* at *9.

87. *Id.*

functional limitations, except that 'she had poor concentration,' 'was feeling sad,' and 'wasn't motivated.'"[88] Additionally, a licensed social worker who diagnosed the plaintiff with generalized anxiety disorder (GAD) testified that he considered the condition to be common and diagnosed at least half of his clients with GAD.[89] Finally, the court noted that *DSM-IV* warns "[i]n most situations, the clinical diagnosis of a *DSM-IV* mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder'. . . ."[90] In a clear criticism of the employee's case, the court highlighted the weakness of the impairment claim.

At the same time, the *Williams* case exemplifies the inherent difficulty associated with challenging the impairment status of a medical diagnosis. Notwithstanding the questionable evidence, the court assumed for purposes of summary judgment that plaintiff had established a mental impairment (dismissing the case instead for a failure to demonstrate substantial limitation of a major life activity).[91] This generosity can be attributed to the fact that courts grant deference to the "mental impairments" listed in *DSM-IV*.[92] As for ADHD, its own listing in the *DSM-IV* bodes well for complainants seeking to meet the impairment standard. Furthermore, ADHD has the potential to abnormally affect a number of bodily activities such as thinking, concentrating, and sleeping, increasing the likelihood of a mental impairment.[93] To date, no case law exists challenging ADHD's status as an impairment. Nonetheless, each ADHD complaint must be examined on a case-by-case basis to determine whether the condition falls within the normal range of human behaviors, a step that is often overlooked in ADA analysis.

B. Substantial Limitation of a Major Life Activity

Once a determination is made that an employee's medical condition constitutes an impairment under the ADA, the analytical focus shifts to whether the individual is substantially limited in the performance of a major life activity. The Supreme Court's recent disability decision in

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88. *Id.*

89. *Williams*, 2000 WL 33175735, at *9.

90. *Id.* at *9 n.18.

91. *Id* at *10.

92. *See* materials cited *supra* note 72.

93. *See generally* WEISS, *supra* note 7, at 10-36. These bodily activities should not be confused with major life activities that are discussed in the upcoming section.

Toyota Manufacturing, Kentucky, Inc. v. Williams[94] clarified a number of important factors with respect to this aspect of the "disability" definition. The Court's guidance suggested that "disability" was not an open-ended meaning, but rather an "exacting definition."[95] In this regard, ADHD complainants must meet a "demanding standard"[96] that will depend primarily upon two issues of law: identifying what constitutes a "major life activity" for purposes of the ADA, and whether the individual's major life activity has been substantially limited by ADHD.[97]

First, the employee complainant must identify a valid major life activity. Prior to *Toyota*, employee causes of action frequently cited working as a major life activity.[98] This can be credited to the EEOC, which lists "working" among the various major life activities contained in its regulations.[99] However, *Toyota* has cast some doubt on the EEOC's interpretation.[100] In her opinion, Justice O'Connor left open the issue of whether working should be considered a major life activity at all, commenting that the Court had "been hesitant to hold as much, and we need not decide this difficult question today."[101] Although it has shown wide deference to EEOC's regulations concerning such major life activities, the Court reserved the right to judge whether the

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94. 534 U.S. 184 (2002).

95. *See* MOOK, *supra* note 58, at 3-42.

96. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. at 197 ("That these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act.").

97. *Id.* at 194-95; *see also* Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (setting forth a three-part test for disability under the statute).

98. Prior to *Toyota*, complainants could rely on "the long history of recognizing working as a major life activity" under the ADA and its "statutory forerunner," the Rehabilitation Act of 1973. Mark C. Radhert, *Arline's Ghost: Some Notes on Working as a Major Life Activity Under the ADA*, 9 TEMP. POL. & CIV. RTS. L. REV. 303, 306 (2000). *See also* Katherine R. Annas, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams: Part of an Emerging Trend of Supreme Court Cases Narrowing the Scope of the ADA*, 81 N.C. L. REV 835, 850 (2003) ("Courts reviewing decisions under the ADA have relied upon 'working' as a major life activity more than any other major life activity . . . .").

99. *See* 29 C.F.R. § 1630.2(i) (2002).

100. Annas, *supra* note 98, at 850 ("Another possible consequence of *Toyota* is the erosion of 'working' as a major life activity.").

101. *Toyota*, 534 U.S. at 200.

EEOC had properly interpreted the major life activity requirement.[102] Furthermore, the *Toyota* Court announced unequivocally that a major life activity is one that is of "central importance" to most people's daily lives.[103]

Ironically, while *Toyota* had the practical effect of limiting the number of individuals who qualified as disabled under the ADA,[104] its preference for major life activities outside the workplace might have the "perverse effect of making it more difficult for employers to determine who is and who is not covered by the ADA statutory requirements."[105] For ADHD cases, it forces complainants to consider other widely recognized major life activities such as caring for one's self, learning, and speaking.[106] The more intriguing inquiry as to major life activities comes when considering those activities that are not mentioned specifically within EEOC regulations.[107] The following activities have received mixed reviews in various jurisdictions: concentrating and thinking,[108] interacting with others,[109] and reading.[110]

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102. *Id. See also* ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994) (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)) ("When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'").

103. *Toyota*, 534 U.S. at 185.

104. Annas, *supra* note 98, at 835-36 ("*Toyota's* holding furthers the emerging Supreme Court trend to decrease the number of Americans with disabilities covered by the ADA.").

105. *See* MOOK, *supra* note 58, at 3-42.

106. *See* 29 C.F.R. § 1630.2(i) (2002) (naming "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" as major life activities). Although not binding, many circuits afford "great deference" to the EEOC's interpretation of disability, including the term "major life activity." Thus, these activities are widely recognized and employees are likely to utilize them in their complaints. *See* Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 79 (2d Cir. 2000) (citing "major life activities *per se*").

107. As noted in *Bragdon*, the EEOC's list is illustrative but not exhaustive. *Bragdon*, 524 U.S. at 639. However, activities that are not listed within the EEOC regulations carry less consensus and are subject to greater scrutiny.

108. At least two circuits have acknowledged that "concentrating" and "thinking" are major life activities within the meaning of the ADA. *See* Gagliardo v. Connaught Labs., Inc., 311 F.3d 565, 569 (3d Cir. 2002) (discussing "concentrating" and "remembering" as major life activities); Brown v. Cox, 286 F.3d 1040, 1045 (8th Cir. 2002) (acknowledging "thinking" and "cognitive thought" as major life activities); Taylor v. Phoenixville Sch. Dist. 184 F.3d 296, 307 (3d Cir.

Because many people in the general population frequently endure substantial degrees of disruption each day in the course of such activities, some jurisdictions are hesitant to characterize them as

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1999) (holding "thinking" is a major life activity). Additionally, it is the position of the EEOC that "concentration" and "thinking" are major life activities. *See* EEOC GUIDANCE, *supra* note 72, at 3. Because "thinking" and "concentrating" are general activities that may not meet the "central importance" test outlined in *Toyota*, other circuits have questioned their use as major life activities. *See* Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999) (holding that "[c]oncentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an 'activity' itself."); Boerst v. Gen. Mills Operations, Inc., 25. Fed. Appx. 403, 406 (6th Cir. 2002) ("Neither concentrating nor stamina qualify as major life activities under the ADA."); Hill v. Metro. Gov't of Nashville, 54 Fed. Appx. 199, 200 (6th Cir. 2002) (finding it doubtful that "thinking" constitutes a major life activity).

109. Once again, there is a split among the circuits on whether this constitutes a major life activity. *Compare* McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999) ("Because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity.'") *and* MX Group, Inc. v. City of Covington, 293 F.3d 326, 337 (6th Cir. 2002) ("We note that it has been held that 'interacting with others' is a major life activity.") *with* Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (rejecting the claim that the "inability to interact with others" implicated a major life activity under the ADA) *and* Davis v. Univ. of N.C., 263 F.3d 95, 101 n.4 (4th Cir. 2001) (footnote omitted) ("This argument approaches a claim that the ability to get along with others is a major life activity, a claim about which we have some doubt.").

110. While many jurisdictions have included reading as an element of "learning" or "working," at least two circuits have held that "reading" by itself constitutes a major life activity. *See* Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 80 (2d Cir. 2000) (major life activities include reading); *see also* Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 626 (6th Cir. 2000). However, the Fifth Circuit has called this conclusion into question. *See* Hileman v. City of Dallas, Texas, 115 F.3d 352, 354 n.44 (5th Cir. 1997) (noting that plaintiff directed the court to no authority suggesting that "reading" is in fact a major life activity). Some complainants have argued that the ability to read continuously for an entire day constitutes a major life activity. However, the ability to read all day long has not been recognized as a separate major life activity. *See* Szmaj v. Am. Tel. & Tel. Co., 291 F.3d 955, 956 (7th Cir. 2002) (the ability to read all day long is not a major life activity). As Judge Posner notes, recognizing the ability to read all day long as a major life activity could cause a very large fraction of the workforce to be disabled as many people experience difficulty reading for prolonged periods. *See id.* at 957. Because many people sustain this discomfort, yet function effectively, it is doubtful that it carries a "central importance" to most people's daily lives and would not constitute a major life activity.

having "a central importance" to most people's daily lives.[111] Nonetheless, ADHD employees complain that the condition inhibits their ability to perform these tasks.[112]

Yet it is not enough to show that an impairment simply affects a judicially recognized major life activity. The complainant must also demonstrate that their condition has caused a "substantial limitation" in such activity. In *Toyota*, the Court addressed this issue as well, stating that the term "substantially limits" means "considerable" or "to a large degree."[113] The Court noted that this requires an individual to "have an impairment that prevents or severely restricts the individual" from performing major life activities.[114] Moreover, the impairment must be "permanent or long term."[115] Ultimately, *Toyota* precludes impairments that interfere in only a "minor way."[116] However, ADHD complainants can still show that their limitations exceed those of the general population and substantially limit a major life activity.[117] This can be a daunting task in light of the fact that a number of their symptoms are commonly shared to some degree by all people.[118]

On the whole, *Toyota* presented a clearer framework for determining an individual's disability status by providing guidance on

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111. This follows the logic that if activities were of "central importance," then people would not put up with the frequent interference of their performance.

112. *See* cases cited *supra* note 11.

113. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 186 (2002).

114. *Id.* at 185.

115. *Id.* (citing 29 C.F.R. § 1630.2(j) (2002)). The Court references EEOC regulations to assist with interpretation of "substantially limits." *Toyota*, 534 U.S. at 185. EEOC regulations define "substantially limits" as "unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner or duration under which an individual can perform that same major life activity." *Id.* To determine whether an individual's impairment substantially limits a major life activity, the EEOC regulations provide courts with the following factors to consider: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. *Id.*

116. *See Toyota*, 534 U.S. at 185.

117. *See* Bristol v. Bd. of County Comm'rs of Clear Creek, 281 F.3d. 1148, 1158 (10th Cir. 2002) ("Determining both how well 'the average person in the general population' performs any given major life activity and whether the plaintiff has proven he is 'unable to perform' or is 'significantly restricted' in performing a major life activity involves weighing evidence and assessing credibility of witnesses . . . .").

118. *See* BPhoenix, *supra* note 41, at 1.

what constitutes a valid major life activity and what it means to be substantially limited in the performance of that major life activity. The next section will look at trends that have emerged as courts apply *Toyota* to ADHD employees.

III. EMERGING TRENDS IN ADHD WORKPLACE COMPLAINTS

*A. Pre-*Toyota

Even before the Supreme Court's decision in *Toyota*, establishing a "disability" for ADHD employees was an uphill battle. Pre-*Toyota* appellate cases focused mostly on well-established major life activities such as working, learning, and speaking. This is demonstrated through two decisions handed down in the Seventh Circuit: *Davidson v. Midelfort Clinic, Ltd.*[119] and *Paul v. Wisconsin Department of Industry, Labor & Human Relations.*[120]

In *Davidson*, a medical clinic psychotherapist brought a disability discrimination and retaliation claim under the ADA against her former employer.[121] The plaintiff was diagnosed with ADHD and complained that it inhibited her ability to take timely dictation, a formal requirement of her job.[122] The district court entered summary judgment for the employer and the former employee appealed.[123]

The court of appeals held that the plaintiff's impairment of ADHD did not pose a significant limitation on her ability to work.[124] While ADHD might have impacted the employee's ability to take timely dictation, the record did not suggest that ADHD posed other limitations on her ability to function effectively as a counselor or that she was precluded from holding other comparable positions as a therapist.[125] The court of appeals also held that the plaintiff's ADHD did not substantially limit the major life activity of speaking because the record revealed no limitations in this regard, and most people who speak do not have a need to dictate in their day-to-day

119. 133 F.3d 499 (7th Cir. 1998) (focusing on the major life activities of working, learning, and speaking).

120. No. 9804955, 1999 WL 685912 (7th Cir. Aug. 24, 1999) (focusing on the major life activity of working).

121. *Davidson*, 133 F.3d at 502.

122. *Id.* at 503-04.

123. *Id.* at 502.

124. *Id.* at 506-07.

125. *Id.*

communications.[126] Finally, the court of appeals found that the plaintiff's ADHD did not substantially limit her ability to learn because she did not offer sufficient proof of this limitation.[127] The plaintiff's "oblique references" to her own impatience and frequent questioning of clinic policies were not enough to establish that she had an ongoing, substantial limitation on her ability to learn.[128]

Another Seventh Circuit decision demonstrating the difficulty of establishing a substantial limitation of an employee's ability to work was *Paul v. Wisconsin Department of Industry, Labor & Human Relations*.[129] Here, a Wisconsin state employee was diagnosed in 1994 as suffering from ADHD. Due to her inability to perform certain functions, she was discharged in 1995.[130] The employee claimed that her employer failed to accommodate her disability.[131] The Seventh Circuit affirmed the district court decision to award summary judgment in favor of the employer because the employee did not raise a material issue of fact as to whether her ADHD substantially limited her ability to work.[132] The district court noted that the employee "had not submitted sufficient evidence from which it could be inferred that her ADHD prevented her from performing a class or broad range of jobs."[133] The Seventh Circuit agreed.[134]

Specifically, the employee relied upon a psychologist's report that diagnosed her as having ADHD. The report stated that her ADHD

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126. *Davidson*, 133 F.3d at 507.

127. *Id.* at 508. It is important to note that the court did not find sufficient evidence of a *present* disability. However, the court did remand on the issue of whether or not Mrs. Davidson established a "record" of an impairment that substantially limited her ability to learn. *Id.* at 509-10. For the purposes of this paper, an employee's record of disability is not being investigated, as most ADHD cases are filed by individuals with a present disability. *See supra* text accompanying note 53. However, it should be highlighted that Mrs. Davidson did note with "specificity" the number of ways in which her past "learning-related limitations manifested themselves," demonstrating sufficient evidence of a "*history* of an impairment substantially limiting her ability to learn." *Davidson*, 133 F.3d at 510 (emphasis added). Such a record of particularity could prove useful in present disability cases. *See infra* note 138.

128. *Davidson*, 133 F.3d at 508.

129. No. 9804955, 1999 WL 685912 (7th Cir. Aug. 24, 1999).

130. *Id.* at *1.

131. *Id.* at *2.

132. *Id.* at *2-3.

133. *Id.* at *2.

134. *Paul*, No. 9804955, 1999 WL 685912, at *2.

"may well be" a factor that "interfered with job performance."[135] However, the psychologist did not address whether the employee would be restricted in a "broad class of positions" that would otherwise demonstrate a substantial limitation.[136] The psychologist even suggested that the employee pursue other job possibilities and opportunities and recommended "the use of [Ms. Paul's] strengths for a return to a placement with the state utilizing her verbal and cognitive skills."[137]

While the Seventh Circuit cases clearly bode well for employers, at least one pre-*Toyota* case favored an ADHD complainant. In *Criado v. IBM Corp.*,[138] a former employee diagnosed with ADHD brought suit against her employer, alleging that she was terminated in violation of the ADA.[139] Although the court focused on the employee's ADHD, as it compounded her depression and anxiety (other impairments), it found that collectively the impairments posed a substantial limitation to major life activities.[140] With little discussion on the particulars, the First Circuit stated that Criado presented evidence showing "that her mental impairments had substantially limited her ability to work, sleep and relate to others."[141] However, it remains to be seen whether employee-complainants can rely upon the outcome in *Criado*. In its post-*Toyota* decisions, the First Circuit has considered two ADHD cases and ruled against employees both times, highlighting the lack of evidentiary support for the plaintiffs' disability claims.[142]

The other pre-*Toyota* cases illustrate the ongoing difficulty associated with ADHD complaints: plaintiffs diagnosed with ADHD have generally failed to articulate their *substantial limitation* with sufficient "particularity."[143] This requires evidence that goes beyond a mere showing of limitation, but rather demonstrates "severity" and "permanence."[144] In other words, these ADHD cases have lacked the

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135. *Id.*

136. *Id.*

137. *Id.* at *3.

138. 145 F.3d 437 (1st Cir. 1998).

139. *Id.* at 439.

140. *See id.* at 442.

141. *Id.*

142. *See* discussion *infra* Part III.B.2

143. *See* Li v. Intel Corp., 35 Fed. Appx. 677, 679 (9th Cir. 2002) (ADHD employee brought suit against employer for wrongful discrimination under the ADA. The employee's alleged disability failed because she "fail[ed] to support her contention with particularity.").

144. *See* MOOK, *supra* note 58, at 3-35.

kind of factual record that would support such a finding.[145] The Supreme Court has stated that even if working is considered a major life activity, a complainant would be required to show that he or she is restricted in a "broad range of jobs" rather than a particular job.[146] For the most part, records in pre-*Toyota* cases have established that employees can experience a limited interference with a specific type of job,[147] but they have failed to allege restrictions in any class of jobs.[148]

As for other major life activities, the records have sometimes lacked any evidentiary support whatsoever, such as Mrs. Davidson's alleged difficulty with speaking.[149] This lack of detailed evidentiary support is a far cry from establishing the type of severity that the ADA requires.

B. Recent Appellate Cases

In 2003, several important cases were handed down in the First and Tenth Circuits regarding individuals with ADHD who filed claims under the ADA: *McCrary v. Aurora Public Schools*,[150] *Doeble v. Sprint/United Management. Co.*,[151] *Calef v. Gillette Co.*,[152] *Wright v. CompUSA, Inc.*[153] and *Whitlock v. Mac-Gray, Inc.*[154] On the whole, the cases illustrate some ongoing difficulties associated with ADHD complaints and the struggle to establish ADHD as a legal disability. Specifically, both circuits seem to suggest that ADHD complaints

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145. However, *see supra* note 127 for an illustration of sufficient evidence in establishing a "record" of substantial impairment.

146. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 200 (2002).

147. This would not include *Criado*, as the First Circuit found the employee was substantially limited in a major life activity. *See* Criado v. IBM Corp., 145 F.3d 437, 442 (1st Cir. 1998).

148. *See* Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 506 (7th Cir. 1998) ("Davidson has come forward with no evidence from which one might reasonably infer that AD[H]D precluded her even from holding other comparable positions as a therapist."); Paul v. Wis. Dep't of Indus., Labor and Human Relations, No. 9804955, 1999 WL 685912, at *3 (7th Cir. Aug 24 1999) ("[Employee's ADHD] was not likely to greatly limit her ability to function within a specific occupational capacity or a broad array of other employment opportunities . . . .").

149. *Davidson*, 133 F.3d at 507.

150. 57 Fed. Appx. 362 (10th Cir. 2003).

151. 342 F.3d 1117 (10th Cir. 2003).

152. 322 F.3d 75 (1st Cir. 2003).

153. 352 F.3d 472 (1st Cir. 2003).

154. 345 F.3d 44 (1st Cir. 2003).

generally fall short on their factual records by failing to show the condition results in a substantial limitation of a major life activity.[155]

1. The Tenth Circuit in 2003

In *McCrary v. Aurora Public Schools,* an elementary school teacher brought an action against her employer and its personnel under the ADA, claiming discrimination on the basis of her ADHD and learning disabilities.[156] Specifically, the plaintiff complained that the school forced her to take disability retirement after refusing to accommodate her condition.[157] The district court awarded summary judgment to the employer on the grounds that the plaintiff-employee failed to establish a disability; the employee then appealed.[158]

The Tenth Circuit concluded that the employee's ADHD did not substantially limit the major life activity of working because she did not present evidence that she was unable to perform either a class of jobs or a broad range of jobs.[159] Additionally, the plaintiff did not demonstrate that she was substantially limited in the ability to think or learn because her deficits were within the average range and she was functioning at or above average compared to the general population (although on a particular day she might not be functioning at that level).[160] Finally, the court reiterated its stance that concentration is not a major life activity although it may be a component of some other activity such as working or learning.[161]

The *Doeble* case is noteworthy because it demonstrates how a company can struggle to balance the needs of an ADHD individual with a company's right to discipline its employees. Here, defendant Sprint placed plaintiff Doeble, a financial analyst, in a department characterized by its negative work environment.[162] Many employees in the department did not get along and "rumors and gossip" were known to flow throughout the employee ranks.[163]

Management initially reprimanded Doeble for improper email usage, tardiness, and confrontational encounters with other employees,

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155. *See Doeble*, 342 F.3d at 1130-31; *Calef*, 322 F.3d at 84-86; *Wright*, 352 F.3d at 477; *Whitlock*, 345 F.3d at 46.

156. 57 Fed. Appx. 362 (10th Cir. 2003).

157. *Id.* at 366.

158. *Id.* at 370.

159. *Id.* at 371.

160. *Id.*

161. *Mcrary,* 57 Fed. Appx. at 370.

162. Doeble v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1122 (10th Cir. 2003).

163. *Id.*

which the company considered "inappropriate behavior."[164] The company later learned she was diagnosed with ADHD. Management also issued a verbal warning and two written warnings, and extended her leave period to help remedy her stress and relational difficulties.[165] Nine months after her initial warning, Doeble was terminated for "attendance problems and lack of personal effectiveness."[166]

Doeble filed suit against Sprint alleging unlawful discrimination under the ADA for failure to accommodate her mental disabilities, unlawful termination, and retaliation.[167] The district court granted summary judgment for Sprint.[168] On appeal, the Tenth Circuit found that Doeble was not disabled under the ADA because she did not "raise a fact issue on whether she was significantly limited in her ability to communicate with others."[169] Evidence of a phone message in which the analyst communicated with slurred speech that was "difficult to understand" was not sufficient to meet a substantial limitation.[170]

Further, Doeble's "interpersonal problems" with many coworkers and subjectivity to nasty comments and jokes were not enough to establish a substantial limitation of interacting with others.[171] The Tenth Circuit stated that "[m]ere trouble getting along" is not sufficient to establish a substantial limitation.[172] Rather, there must be a showing of severe levels of "hostility, social withdrawal or failure to communicate when necessary."[173] In this case, the record showed that Doeble exhibited none of these severe impairments and was even socially active in the community.[174]

In *Calef v. Gillette Co.*, an employee was terminated after behaving in a threatening manner toward co-workers.[175] The employee sued the employer, claiming the employer violated the ADA by terminating his employment and failing to reasonably accommodate him.[176] The

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164. *Id.* at 1123.

165. *Id.* at 1123-27.

166. *Id.* at 1127.

167. *Doeble*, 342 F.3d at 1121.

168. *Id.*

169. *Id.* at 1131.

170. *Id.*

171. *Id.* It should be noted that the Tenth Circuit assumed, without deciding, that interacting with others constituted a valid major life activity.

172. *Doeble*, 342 F.3d at 1131.

173. *Id.*

174. *Id.*

175. Calef v. Gillette Co., 322 F.3d 75, 77 (1st Cir. 2003).

176. *Id.*

district court awarded summary judgment for the employer and dismissed the ADA claim because the employee was not substantially limited in a major life activity.[177] The employee appealed, but the First Circuit upheld the district court's decision.[178]

In upholding the district court's decision, the appellate court found that the plaintiff's ADHD did not substantially limit his major life activity of learning because standard intelligence tests confirmed that his overall learning ability fell within the "average range."[179] Furthermore, standard scholastic achievement tests demonstrated plaintiff's "academic skills to be within the normal range for a man of his general abilities and educational level," despite the fact that he scored lower on some tests.[180] The plaintiff's other claimed major life activity, speaking, "fare[d] no better" because the medical evidence showed that plaintiff's "language is normal."[181] The court pointed to a comprehensive assessment proving that the employee's verbal abilities were also "within average range, including his verbal productivity, articulation, fluency, grammar and syntax, and vocabulary."[182]

2. *The First Circuit in 2003*

The First Circuit was busy reviewing ADHD claims in 2003 as well. One case, *Wright vs. CompUSA, Inc.*, involved a computer store sales manager named Stephen Wright who had been diagnosed with AD[H]D. While working for CompUSA, Wright experienced high levels of stress and anxiety on the job that exacerbated his ADHD symptoms.[183] Wright claimed that his new general manager had caused the increased stress levels which resulted in disruptive behavior and numerous conflicts between the two.[184] After receiving follow-up treatment for his ADHD, Wright's psychiatrist sent a letter to his employer explaining his condition.[185] Nevertheless, Wright was later terminated for insubordination because he failed to report to another office as instructed.[186]

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177. *Id.* at 83-86.
178. *Id.* at 77.
179. *Id.* at 84.
180. *Calef*, 322 F.3d at 84.
181. *Id.*
182. *Id.*
183. Wright v. CompUSA, Inc., 352 F.3d 472, 474 (1st Cir. 2003).
184. *Id.*
185. *Id.*
186. *Id.* at 475.

Wright filed a disability claim alleging wrongful discrimination and retaliation against the computer store.[187] After the district court granted summary judgment in favor of CompUSA,[188] the First Circuit affirmed and found that Wright provided no evidence that his ADHD caused the disruptive behavior.[189] The appellate court further noted that the evidence did not demonstrate that ADHD "rendered him unable to perform some usual activity compared to the general population or that he had a continuing inability to handle stressful situations."[190] The opinion stated that even though Wright provided some evidence that ADHD affected many activities in his daily life, a reasonable juror could not conclude that "he was substantially limited in the major life activities of reading, speaking, concentrating, hearing and processing information, and thinking and articulating thoughts, as he contends."[191]

The First Circuit handed down a second decision regarding an ADHD employee in *Whitlock v. Mac-Gray, Inc.* Here, an employee of a national laundry service provider was diagnosed with ADHD and struggled with his ability to concentrate and focus at work.[192] When the company decided to reorganize its shipping department, it dismantled partitions around the employee's workspace and removed a radio that was said to be distracting to other employees.[193] Responding to the change in work atmosphere, the employee decided to take disability leave and later returned to work.[194] On the advice of his doctor, the employee requested that he be permitted to work four days a week with no overtime and resume using his radio.[195] The company acceded to both requests, but eventually the employee left his job and filed a disability claim.[196]

In reviewing the district court's grant of summary judgment in favor of the employer, the First Circuit provided the employee the benefit of the doubt and assumed, without deciding, that work constituted a major life activity.[197] However, the First Circuit found that the

187. *Id.*
188. *Wright*, 352 F.3d at 478.
189. *Id.* at 476.
190. *Id.*
191. *Id.* at 477.
192. Whitlock v. Mac-Gray, Inc., 345 F.3d 44, 45 (1st Cir. 2003).
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Whitlock*, 345 F.3d at 46 n.2.

employee offered no evidence supporting his contention that he was precluded from working in a broad class of jobs.[198] As a matter of fact, the court found that the record revealed the company "believed he could do his job."[199] Furthermore, the employee's physician failed to support his claim sufficiently by making a "conclusory assertion of total disability" without sufficient backing in the record demonstrating the "particular limitations required by *Toyota*."[200]

3. Synthesizing the 2003 Decisions

These recent cases demonstrate continuing problems that ADHD employees have with establishing "particularity" in the record.[201] In *McCrary*, the ADHD employee relied upon a single doctor's evaluation to establish that she was substantially limited in the major life activities of thinking, learning, working and concentrating. This doctor's testimony, coupled with his deposition, established nothing more than the fact that the plaintiff experienced some deficits in her ability to think and learn. Furthermore, the plaintiff's record failed to present any evidence that she was restricted from performing a broad range of jobs, a requirement for showing a substantial limitation in her ability to work.

Even when records are more fully developed, *Calef* shows how the employee must be substantially limited compared with the average individual in the general population.[202] While Calef was able to present evidence that he scored "significantly below average" on a particular test designed to measure his resistance to distraction, it was only one factor that was used to determine his learning ability in comparison to the average individual.[203] A neurologist's report revealed that he was "very effective in terms of his ability to concentrate, read, etc.," and his previous experiences revealed his capability of learning new job skills.[204] It was the overall history of Calef's learning record in

198. *Id.* at 46.

199. *Id.*

200. *Id.*

201. *See supra* note 143.

202. *See* Calef v. Gillette Co., 322 F.3d 75, 85 (1st Cir. 2003) (citing 29 C.F.R. § 1630.2(j)(1) (2002)).

203. *Id.* at 84-86; *see also* Li v. Intel Corp., 35 Fed. Appx. 677, 679 (9th Cir. 2002). This Ninth Circuit case involves an ADHD employee and stresses the same idea that a substantial limitation must be determined by looking at how "the average person in the general population can perform [learning]."*Id.*

204. *Calef*, 322 F.3d at 84.

comparison to the average individual that determined the outcome of this case. In the words of the court, "These facts doom the claim."[205]

Not all of the news is bad for ADHD employees. Because *Toyota* cast some doubt on recognizing work as a major life activity, which could limit the number of future ADHD cases, it may have forced plaintiffs to investigate new and creative ways of establishing major life activities outside of those recommended by the EEOC. In *McCrary*, the plaintiff attempted to establish that thinking and concentrating were major life activities, even though they are not listed within EEOC regulations. This effort seemed to work, as the court accepted the major life activity of "thinking." Likewise, *Wright* seemed to recognize several major life activities not listed within the regulations including reading, thinking, and articulating thoughts.[206] *Doeble* recognized interacting with others as a valid major life activity.[207] By utilizing a variety of potential major life activities outside the EEOC regulations, employees increase their chances of establishing a disability.[208]

However, it must be cautioned that complainants cannot always rely on these outside activities as courts often decline to recognize them for failing to meet *Toyota's* "central importance" test.[209] This is evidenced by the *McCrary* court's refusal to accept concentrating as a major life activity.

C. *Hypothesis for Claiming a Disability for ADHD Complainants*[210]

Although the case law regarding ADHD as a legal disability seems to favor employers, there are a couple of related precedents where employees have successfully established a legal disability. One of the most useful cases is *Criado v. IBM Corp.*, which was addressed earlier in this Note.[211] *Criado* is an interesting case for two reasons. First, it was decided prior to *Toyota*, and it remains to be seen how appellate courts will treat future cases that deal with working as a major life

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205. *Id.*

206. Wright v. CompUSA, Inc., 352 F.3d 472, 477 (1st Cir. 2003).

207. Doeble v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1131 (10th Cir. 2003).

208. *See supra* notes 108-10 and accompanying text.

209. *See supra* note 103.

210. It is not a forgone conclusion that ADHD will always fail to qualify as a legal disability. *See, e.g.*, *Calef*, 322 F.3d at 86 ("On different facts, ADHD might disable an individual such that the ADA applies.").

211. *See* discussion *supra* Part III.A.

activity.[212] Second, it introduces additional major life activities that are more intriguing for ADHD cases. Two of these additional major life activities, sleeping and relating to others, are not found within the EEOC's regulations. The First Circuit, however, seems to have no problem recognizing their validity.[213]

Specifically, sleeping has been widely mentioned in many circuits as a valid major life activity[214] and few cases expressly reject it as such.[215] Given this wide jurisdictional support, sleeping likely would qualify as a major life activity for an ADHD employee. If the employee was able to show an adequate disruption of sleep that exceeds the average individual in the general population, he might find more success than with disruptions to work. Far less consensus exists, however, on whether relating to others constitutes a valid major life activity.[216] But, if the employee can find a jurisdiction that recognizes it as such, he or she would have an opportunity to develop a record that shows substantial disruption because many ADHD symptoms such as impulsivity and irritability inhibit interaction with others.[217]

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212. Recall that the First Circuit passed on the determination of whether work is a valid major life activity in *Whitlock*. *See supra* notes 94-103 and accompanying text.

213. Criado v. IBM Corp., 145 F.3d 437, 442 (1st Cir. 1998).

214. McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999); Pack v. K-Mart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999); *see also* Boerst v. Gen. Mills Operations, 25 Fed. Appx. 403, 406 (6th Cir. 2002) (sleeping is a major life activity under the ADA); EEOC v. Sara Lee Corp., 237 F.3d 349, 352-53 (4th Cir. 2001); Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998); *Criado*, 145 F.3d at 442-43; Scarborough v. Natsios, 190 F. Supp. 2d 5, 21 n.14 (D.D.C. 2002) ("Although this Circuit has not addressed the issue, other circuits have found that sleeping is a major life activity under the Act, even though it is not named as such in the EEOC regulations.").

215. *But see* Sarko v. Penn-Del Directory Co., 968 F. Supp. 1026, 1035 (E.D. Pa. 1997).

> Plaintiff also claims that "the mental impairment substantially limited a major life activity, namely the ability to get a sound night's sleep and to report work on time, clear-minded, in the morning." Plaintiff cites no cases recognizing such a major life activity, and we find no support for doing so here.
>
> *Id.*

216. Relating to others is likely to be equated with interacting with others. *See supra* note 109.

217. *See* discussion *supra* Part I.

A second precedent that could prove useful for ADHD employees is *Humphrey v. Memorial Hospitals Ass'n.*[218] In this case, a medical transcriptionist diagnosed with obsessive compulsive disorder brought an action against her former employer alleging she was terminated in violation of the ADA.[219] This case is relevant because the court recognized obsessive compulsive disorder as a mental impairment[220] in a manner similar to cases which recognize ADHD as a mental impairment.[221] The court found that the employee was substantially limited in caring for herself because the evidence revealed that washing and brushing her hair alone could take several hours and that she prepared for work from early morning until early evening.[222] Also in support of this finding, a clinical psychiatrist testified that the employee was rated as taking three times as long as most people to shower, wash her hands, dress, and handle or cook food.[223]

Because caring for one's self is listed directly within EEOC regulations, an ADHD employee has an additional way to establish a valid major life activity.[224] To date there have been no appellate decisions that involve an employee with ADHD complaining of this restriction. This may be because the level of distraction experienced by most ADHD employees would not severely limit their ability to care for themselves. Still, if such an ADHD case exists, then this recent decision in the Ninth Circuit demonstrates how an employee's range of options in establishing a disability can be expanded.

CONCLUSION

ADHD employees face an uphill battle to establish a disability under the ADA. Much of this can be attributed to the fact that these

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218. 239 F.3d 1128 (9th Cir. 2001).

219. *Id.* at 1128.

220. *Id.* at 1134-35.

221. *See supra* note 67.

222. *Humphrey*, 239 F.3d at 1131.

223. *Id.*

224. ADHD symptoms include being fidgety. *See supra* note 33 and accompanying text. It is conceivable that severe fidgeting, particularly if combined with other symptoms such as "excessive restlessness," could substantially interfere with the ability to care for one's self. For example, severe fidgeting could inhibit the individual's ability to bathe, cook or dress, just like the *Humphrey* case. *See* 239 F.3d at 1131. Whether or not there is substantial limitation depends upon the facts supporting the record. *See supra* note 127.

employees exhibit symptoms that are difficult to distinguish from normal human behavior. Nonetheless, the Supreme Court has always preferred a review of each disability claim on a case-by-case basis.[225]

In determining whether an individual's condition constitutes a mental impairment under the first step of the ADA disability analysis, many courts recognize ADHD as an impairment based on its citation within *DSM-IV*, even though the condition is not specifically listed as an impairment under EEOC regulations. Although an argument can be made that an individual's ADHD does not constitute a mental impairment because it falls within the normal range of human activity, the medical community's recognition of ADHD as a disabling condition makes it more likely that courts will acknowledge its impairment status.

The ADHD individual's disability status, therefore, will likely hinge on whether ADHD complainants can establish that their condition substantially limits a legally recognized major life activity. Based on guidance provided by *Toyota*, ADHD complainants have attempted to establish that they are substantially restricted in the major life activities of learning, working, speaking, concentrating, sleeping, and interacting with others. However, while some uncertainty remains over whether each of these constitutes a major life activity, ADHD complainants face a greater challenge in demonstrating with particularity the level of severity required by the ADA to show substantial limitation. Unless ADHD complainants can do a better job of making such a demonstration as well as distinguishing their symptoms to a degree dramatically different from the behaviors exhibited by the general population, more often than not ADHD complainants will continue to fail to meet the burden for establishing a disability under the ADA.

225. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002).